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In the Supreme Court of the United States

OCTOBER TERM, 1984

BUCKINGHAM CORPORATION, PETITIONER

v.

ODOM CORPORATION,
d/b/a/ ARIZONA DISTRIBUTING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

1. Petitioner, the Buckingham Corporation (Buckingham), is the American importer of Cutty Sark brand scotch whisky. For some time prior to 1981, Buckingham distributed Cutty Sark in Arizona through two distributors, respondent Arizona Distributing Company (ADC) and Copper State Distributors, Inc. (Copper State). This lawsuit arises out of Buckingham's termination of ADC and appointment of Copper State as its exclusive distributor of Cutty Sark in Arizona.[1] On August 25, 1981, approximately one week after it notified ADC of the termination,

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[1]Respondent does not dispute that it was in Buckingham's competitive interest to move from a dual to an exclusive distribution scheme for the Arizona market. See Tr. 251-253; Pet. App. 20a.

Buckingham sued in the district court for a declaratory judgment that the termination was lawful. ADC counterclaimed that the termination was part of a conspiracy by Buckingham and Copper State to fix prices in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

The case proceeded to trial before a jury. The record shows little disagreement concerning the events preceding the termination, although the parties sharply dispute the inferences to be drawn therefrom.

For a ten-day period in late April 1981, ADC substantially reduced its case price on Cutty Sark. Copper State's president, Bernard Gellerman, telephoned Buckingham's senior vice president, Kenneth Ahlburg, to complain about ADC's discount and to request that Ahlburg investigate. Ahlburg, on instructions from Buckingham's senior vice president, Stephen Karp, went to Arizona to assess the situation. Ahlburg met first with ADC's president, Jack Braddock, who explained the reason for the discount.[2] Ahlburg told Braddock that the discount was inappropriate, and that "in the future" Buckingham wanted to "have a say in the programming of the brand."[3] Later that same day, Ahlburg met with Gellerman, who said that ADC's discount was "stupid," and that Copper State had not engaged in discounting of the sort ADC claimed. Gellerman promised that if Copper State were appointed exclusive distributor of Cutty Sark he would "make this kind of

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[2]Braddock claimed that Copper State consistently offered greater discounts than ADC, and that ADC's ten-day promotion was intended to "show the competition" that it was "still in the business of selling Cutty Sark." Tr. 218.

[3]Tr. 222. There was conflicting testimony regarding whether the term "programming" encompassed pricing and discounts, or was instead limited to non-price marketing strategy, *e.g.*, advertisements and retail displays. *Compare* Tr. 223 *with* Tr. 122.

commitment, whatever it takes to build this brand I'm here to do it." Tr. 596, 713. Ahlburg in turn said that he would recommend that Copper State be made Buckingham's exclusive distributor of Cutty Sark in Arizona.

On April 29, 1981, Ahlburg sent a memorandum to Karp, explaining that "Arizona is too small for two wholesalers selling [Buckingham's] line * * *. [U]niform marketing that gets results cannot be coordinated with a dual." Pet. App. 22a. The memorandum also outlined Ahlburg's view that ADC's discount was poorly timed, ineffective at generating extra sales to consumers, and "can and will be very detrimental to our over-all long term marketing of Cutty Sark." *Ibid.* Finally, the memorandum reported Gellerman's denial that Copper State priced its products so as to "beat [ADC] by a dollar," *ibid.*, and closed with Ahlburg's recommendation that Copper State be appointed Buckingham's exclusive Arizona distributor. On August 17, 1981, after investigating Copper State's financial resources and stability, Buckingham informed ADC that it was to be terminated. Tr. 135-139.

At the close of ADC's evidence, the district court granted the petitioner's motion for a directed verdict (Pet. App. 14a-17a). The court concluded that "whatever was said, I can't find that what Mr. A[h]lburg said to Mr. Braddock was coercive. * * * I can't find anything in the evidence from which to support a finding that Mr. Gellerman agreed that if he had the exclusive he would follow Buckingham's suggestions as to prices * * *." *Id.* at 16a.[4]

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[4]The court also noted that because both ADC and Copper State had asked to be appointed Buckingham's exclusive distributor, and both had at one point priced below the other, "Buckingham is in a no-win situation in this case." Pet. App. 17a.

In an unpublished opinion, the court of appeals reversed and remanded for trial (Pet. App. 10a-13a). It held that "[a]lthough [ADC's] evidence was weak, there was sufficient circumstantial evidence of concerted action to withstand the motion for a directed verdict." *Id.* at 11a. In the court's view, the Ahlburg memorandum, "which focused on the pricing reasons for the termination," combined with "Gellerman's offer to make a 'commitment' in exchange for an exclusive distributorship," was "sufficient * * * to support a jury verdict in [ADC's] favor by reasonable persons." *Id.* at 11a-12a. The court reasoned that although "Gellerman might have only meant a commitment to sell the product aggressively, a reasonable jury might have interpreted it as an offer to let Buckingham have some control over price." *Id.* at 12a.

Buckingham filed a petition for a writ of certiorari (No. 82-1787) on April 19, 1983. On April 2, 1984, this Court granted the petition, vacated the judgment of the court of appeals, and remanded for reconsideration in light of *Monsanto Co.* v. *Spray-Rite Service Corp.*, No. 82-914 (Mar. 20, 1984).

On remand, after supplemental briefing, the court of appeals, with one judge dissenting, issued an unpublished order reinstating its initial disposition of the case (Pet. App. 7a-9a). The majority held that its prior opinion had "applied the same test as required by *Monsanto* * * * namely, that there be sufficient evidence to overcome a motion for a directed verdict on the question of whether there was a common scheme * * * designed to achieve price control, and that [ADC] was terminated as a result." Pet. App. 7a-8a. Judge Poole dissented. He concluded that ADC's evidence was "[a]t best * * * 'highly ambiguous'," and therefore insufficient to withstand a motion for directed verdict under *Monsanto*. Pet. App. 9a.

In *Monsanto,* this Court ruled that evidence that a manufacturer terminated one distributor following complaints by other distributors about price cutting is insufficient to support a finding of concerted action under Section 1 of the Sherman Act. Instead, a plaintiff must produce "evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. * * * [T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' " Slip op. 9 (citation omitted). The standard stated in both decisions of the court of appeals in this case does not conflict with the standard announced in *Monsanto.* Thus, the primary question in this case is whether that standard was properly applied—a wholly factbound issue.

For the reasons set forth by Judge Poole in his dissent, we believe that the evidence in this case is weaker than the evidence deemed sufficient in *Monsanto,*[5] and we believe also that the district court correctly granted the motion for a directed verdict.[6] But, although we think the decision below

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[5]In *Monsanto* the plaintiff presented "substantial *direct* evidence of agreements to maintain prices," slip op. 10 (emphasis in original), and circumstantial evidence that the plaintiff was terminated as a result of its price cutting. *Id.* at 10 n.10. By contrast, the evidence the court of appeals found sufficient to support an inference of conspiracy here—Gellerman's statement that he was willing to do whatever was necessary to promote Cutty Sark—is both circumstantial and "highly ambiguous." *Monsanto,* slip op. 8. Similarly, the evidence relied on by respondent to establish that ADC was terminated because of its price cutting—the Ahlburg memorandum—is, at best, ambiguous. On its face the document indicates that Ahlburg's objection was not based simply on ADC's discount program, but instead on the fact that the discount was poorly structured and poorly timed.

[6]As this Court explained in *Monsanto,* complaints by rival distributors are insufficient to support an inference of conspiracy because they are "natural [and] unavoidable." Slip op. 8. *A fortiori,* Gellerman's

is incorrect, we do not believe that further review is warranted simply to determine whether the court of appeals has correctly applied controlling law in the present interlocutory posture of the case. Cf. *Ross* v. *Moffitt*, 417 U.S. 600, 616-617 (1974).

Nor do we believe that this decision threatens to undermine this Court's decision in *Monsanto*. Both the initial and later dispositions of the Ninth Circuit are unpublished, and are therefore devoid of precedential value "except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel." 9th Cir. R. 21(c). And more recent decisions in the Ninth Circuit are consistent with *Monsanto's* teaching that "highly ambiguous" evidence cannot support an inference of an agreement to fix prices, particularly where there is "strong legitimate business motivation for [challenged] conduct." *Landmark Development Corp.* v. *Chambers Corp.*, 752 F.2d 369, 372 (1985); *Barnes* v. *Arden Mayfair, Inc.*, No. 84-3621 (Apr. 15, 1985) (affirming grant of summary judgment for defendant where plaintiff's evidence as to conspiracy consisted solely of complaints by competitors).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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statement to the effect that he would do whatever was necessary to promote Cutty Sark is unobjectionable and precisely what a distributor in Copper State's position would be expected to say.